No. 80518-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RANDALL J. PATTON,

Petitioner.

AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

Other State Cases

Constitutional Provisions

INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties, including privacy. The ACLU strongly supports adherence to the provisions of Article 1, Section 7 of the Washington State Constitution, prohibiting unreasonable interference in private affairs. It has participated in numerous privacy-related cases as *amicus curiae*, as counsel to parties, and as a party itself.

ISSUE TO BE ADDRESSED BY *AMICUS*

Whether a suspicionless search of a vehicle violates Article 1, Section 7 when a person is told he is under arrest while standing outside of the vehicle.

STATEMENT OF THE CASE

On the night of March 19, 2005, Randall Patton was standing outside his automobile, which was parked by his residence. Patton was looking inside the driver's side door when Deputy Tim Converse came to Patton's residence to arrest Patton on an outstanding warrant. Deputy Converse yelled to Patton that he was under arrest. At that moment, only Patton's head was inside the car. Patton fled to his nearby residence, and

was apprehended by officers a little while later, handcuffed, and placed in the back of a patrol car.

The officers then searched Patton's car without a warrant. This search was undertaken even though it was not supported by the justifications behind the search incident to arrest exception to the warrant requirement. First, there was no possibility of Patton destroying evidence of the crime for which he was arrested. The arrest was made pursuant to an outstanding warrant for a previous offense. Moreover, Patton was already handcuffed and secured in the patrol car, and could not have destroyed evidence even if it were present in the car. Second, the officers did not articulate any reason to believe there were weapons in the car, even if Patton were somehow to escape from custody and run to his car.

The trial court suppressed evidence found in this warrantless and suspicionless search. The Court of Appeals, however, held the search was encompassed within the search incident to arrest rule as announced in *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986), which allows a search of the entire passenger compartment of a vehicle (except for locked containers) incident to the arrest of its driver. *See State v. Patton*, No. 34025-9-II (April 20, 2007) (unpublished).

Amicus takes no position on the question of when Patton's arrest became effective. Instead, *amicus* respectfully suggests that the case

should be resolved by reference to the doctrine of vehicle searches incident to arrest. *Stroud* has not retained its vitality as a correct interpretation of Article 1, Section 7 of the Washington State Constitution, and in any event it does not extend to searches incident to the arrest of a person standing outside a parked car.

ARGUMENT[1]

In reversing the suppression of evidence found in Patton's car, the Court of Appeals allowed fishing expeditions based on no suspicion whatever. The mere fact that a person has his head inside a parked vehicle when he is told he is under arrest cannot justify a search of that vehicle. The Court of Appeals erred in extending *Stroud* to the facts of this case, and in failing to consider more recent precedent from this Court that calls into question *Stroud's* continued vitality.

A. *Stroud* Is Inconsistent With the Privacy Guarantees of Article 1, Section 7

Modern interpretation of Article 1, Section 7 began in the early 1980's, when this Court "indicated that [it] will protect Washington

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[1] This argument has considerable overlap with the argument submitted by *amicus* in Section A of its Memorandum in Support of the Petition for Review in *State v. Lopez*, No. 81325-6. *Amicus* anticipates submitting a similar argument in *State v. Valdez*, No. 80091-0. The argument is repeated here for the convenience of the Court rather than incorporated by reference.

citizens' right to privacy in search and seizure cases more vigorously than they would be protected under the federal constitution." *State v. Stroud*, 106 Wn.2d 144, 148, 720 P.2d 436 (1986) (citing the few previous instances: *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980); *State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982); *State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983), *overruled in part by Stroud*; *State v. Myrick*, 102 Wn.2d 506, 688 P.2d 151 (1984)). *Stroud* itself was a modest example of that greater privacy protection. It generally followed the Fourth Amendment rule which permits a search of the entire passenger compartment incident to the arrest of the driver, *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). Giving only slightly greater deference to privacy, the rule announced in *Stroud* allows a search of the entire passenger compartment except for locked containers. *Stroud*, 106 Wn.2d at 152.

As one of the early Article 1, Section 7 cases, *Stroud* had little previous jurisprudence to draw upon in determining the appropriate scope of Article 1, Section 7's greater privacy protections. In the decades since *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)—a decision announced the same day as *Stroud*—Washington courts have developed a great deal of case law interpreting Article 1, Section 7 and recognized that

it is one of the country's strongest constitutional privacy provisions. The *Stroud* rule is incompatible with this subsequent jurisprudence.

Although it has long been recognized that Article 1, Section 7 is more protective of privacy than the Fourth Amendment, it is only recently that the overarching philosophy of the difference in interpretive approaches has been formulated. "In short, while under the Fourth Amendment the focus is on whether the police acted reasonably under the circumstances, under article I, section 7 we focus on expectations of the people being searched." *State v. Morse*, 156 Wn.2d 1, 10, 123 P.3d 832 (2005). If this basic approach had been recognized in 1986, it is unlikely *Stroud* would have been decided the same way. The focus there was on determining reasonable guidelines for police actions, rather than on delineating the reasonable expectation of privacy that drivers have in their vehicles. Article 1, Section 7 prohibits the invasion of that privacy without authority of law; invasion cannot be justified in the absence of exigent circumstances simply because officers act "reasonably."

Several other states that have considered the issue in recent years have drawn much different conclusions than *Stroud* under their own state constitutions. Rejecting *Belton* entirely, they allow vehicle searches incident to arrest only when necessary "to ensure police safety or to avoid the destruction of evidence." *State v. Eckel*, 185 N.J. 523, 539, 888 A.2d

1266 (2006); *see also Commonwealth v. White*, 543 Pa. 45, 669 A.2d 896 (1995); *Camacho v. State*, 119 Nev. 395, 75 P.3d 370 (2003); *State v. Pittman*, 139 N.M. 29, 127 P.3d 1116 (N.M. Ct. App. 2005); *State v. Bauder*, 924 A.2d 38 (Vt. 2007). The weight and trend of these decisions, combined with Washington's usual status as a national leader in state constitutional privacy guarantees, suggests that it is time for this Court to reconsider *Stroud* with the benefit of the substantial Article 1, Section 7 jurisprudence that has been developed since *Stroud* was decided.

Stroud was a pragmatic experiment, attempting to create a bright line rule to guide law enforcement and courts, even with some cost to individuals' privacy. But the *Stroud* rule has failed to provide clarity; this Court alone has since dealt with a variety of cases involving searches of vehicles incident to arrest, and the Court of Appeals has dealt with numerous others. *See, e.g., State v. Fladebo*, 113 Wn.2d 388, 779 P.2d 707 (1989) (purse is not equivalent of locked container); *State v. Johnson*, 128 Wn.2d 431, 909 P.2d 293 (1996) (sleeping unit in truck is part of "passenger compartment"); *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999) (cannot search passenger's belongings incident to arrest of driver); *State v. Vrieling*, 144 Wn.2d 489, 28 P.3d 762 (2001) (entire motor home is part of "passenger compartment"); *State v. Jones*, 146 Wn.2d 328, 45 P.3d 1062 (2002) (reaffirming *Parker*); *see also State v. Lopez*, 142 Wn.

App. 930, 176 P.3d 554 (2008); *State v. Valdez*, 137 Wn. App. 280, 152 P.3d 1048 (2007), *review granted*, No. 80091-0, __ Wn.2d __ (Mar. 6, 2008).

The experience of two decades shows that *Stroud's* bright line rule has not operated as intended to balance privacy against the needs posed by exigent circumstances. *Stroud*, 106 Wn.2d at 152. Instead, it has allowed searches where there are *no* exigent circumstances, and has encouraged fishing expeditions and pretextual searches. The *Stroud* rule is incompatible with continued Article 1, Section 7 jurisprudence, as well as state constitutional interpretations in other jurisdictions. *Amicus* respectfully urges this Court to reconsider *Stroud* and overrule it, instead allowing searches of vehicles incident to arrest only when there truly are exigent circumstances—either a reasonable threat to officer safety or a reasonable likelihood of destruction of evidence related to the crime that is the basis of the arrest.

B. Patton's Car Was Not Validly Searched Incident to His Arrest

Even should this Court decide to retain the *Stroud* rule, that rule cannot justify the search of Patton's vehicle. Article 1, Section 7 prohibits invasion of private affairs without "authority of law," which normally requires a warrant or subpoena issued by a neutral magistrate. *See State v.*

Miles, 160 Wn.2d 236, 156 P.3d 864 (2007). Exceptions to the warrant requirement, including the exception for searches incident to arrest, must be narrowly construed. *See, e.g., Jones*, 146 Wn.2d at 335. The Court of Appeals instead broadly construed the *Stroud* rule.

"[T]his court has consistently expressed displeasure with random and suspicionless searches, reasoning that they amount to nothing more than an impermissible fishing expedition." *State v. Jorden*, 160 Wn.2d 121, 127, 156 P.3d 893 (2007). Yet that is exactly what the *Stroud* rule allows, as demonstrated in the current case. Deputy Converse went to Patton's home armed with an arrest warrant, not a search warrant. The intent was to arrest Patton, not search for evidence relating to either the existing charge or other criminal activity. The officer had no reason to suspect that any contraband would be found in Patton's car; there is no evidence that the officer was even aware of the existence of the car before he saw it parked by Patton's residence. Nor did the officer's encounter with Patton raise any reasonable suspicions about criminal activity in the car; all he saw was Patton looking around in his parked car, just as thousands of Washingtonians do for a variety of innocuous purposes every day. The search of the car was simply a fishing expedition, hoping to find evidence of some unknown criminal activity.

There would be no question that such a fishing expedition would have been unconstitutional if Patton had been found standing with his head inside the door of a storage shed, or even looking into a garbage can. There is no functional distinction between that scenario and the actual one. Patton's car was parked, and there is no reason to believe it had been driven recently. There was no key in the ignition. And Patton wasn't even inside the vehicle—he was standing outside, and only his head was inside. The officers had secured both Patton and his vehicle prior to the search. There was neither a threat to officer safety, nor a risk that evidence would be destroyed. Nothing prevented the officers from delaying the search until they had obtained a search warrant—except that a neutral magistrate would find absolutely no support for a warrant.

This Court recognized long ago that Washingtonians have a strong privacy interest in their automobiles, and there is no Washington "automobile exception" allowing a search without a warrant. *See State v. Gibbons*, 118 Wash. 171, 203 P. 390 (1922); *Ringer*, *supra*. Motor vehicles are "necessary to the proper functioning of modern society," and Washingtonians are entitled to use them without sacrificing their right to privacy. *State v. Boland*, 115 Wn.2d 571, 581, 800 P.2d 1112 (1990).

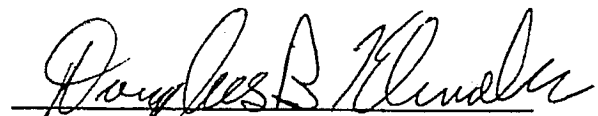
Patton's arrest—outside his parked car, with no exigent circumstances—did not change his privacy interest in his car, whether

viewed with common sense or the constitutionally required narrow drawing of the 'search incident to arrest' exception to the warrant requirement. Hence, there was no "authority of law" to search Patton's car.

CONCLUSION

For the foregoing reasons, the ACLU respectfully requests the Court to reverse the Court of Appeals, and hold that Article 1, Section 7 prohibited the search of Patton's vehicle.

Respectfully submitted this 29th day of April 2008.

By 

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